

STATE LIABILITY FOR POLICE ACTION WITH SPECIFIC REFERENCE TO

MINISTER OF POLICE V RABIE 1986 (1) SA 117 (A)

BY

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SUMMARY

This study sought to make a detailed discussion of state liability for police action with specific reference to the case of *Minister of Police v Rabie* 1986 (1) SA 117 (A). The historical development of state liability was traced from Roman-Dutch Law, through English Law up to and including South African Law.

The major part of this work has been devoted to an in-depth discussion of the case of *Minister of Police v Rabie* 1986 (1) S.A. 117 (A), which is the modern *locus classicus* on state liability for police action in South Africa. In this case the risk principle appears to have been expressly incorporated into South African law. This is the principle which postulates that the injured party should be compensated even if there was no fault on the part of the wrongdoer.

During the course of this study a brief discussion of case law that followed the *Rabie* decision was also made. The risk principle adopted in the *Rabie* case was rejected and subjected to severe criticism. These decisions suggested the application of the traditional standard test which places emphasis on the question of whether the policeman's acts were done within the course and scope of his employment. The case of

Minister of Law and Order v Ngobo 1992 (4) SA 822 (A) was even bold enough to reject the principle on the basis that it is controversial and untried.

The drastic inroad made by certain sections of the **Constitution of the Republic of South Africa Act 200 of 1993** into this field of study was also acknowledged. It was submitted that in the light of this new law, the members of the police force as protectors of individual rights will in future have to be carefully chosen, screened, trained and constantly supervised in order to minimise the number of claims against the state based on damages.

It was finally accepted that in so far as the test for vicarious liability is concerned, the Appellate Division in *Ngobo's* case has, by reverting to the application of the traditional standard test, overruled its previous decision in the *Rabie* case. It was submitted that an uncertainty in the law has been created by these conflicting decisions and legislative intervention is therefore warranted.

STATE LIABILITY FOR POLICE ACTION WITH SPECIFIC
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117 (A) .

A. Introduction

In this treatise a detailed discussion of state liability for police action will be made with specific reference to the case of *Minister of Police v Rabie*¹ which is the leading case in this regard. A discussion of this case will be preceded by a short historical development of state liability. A short discussion of the relevant sections of the new South African Constitution² will also be given.

B. Historical development of state liability

(i) Roman-Dutch law

As Roman-Dutch law forms part of South African common law, a discussion of historical development of any branch of South African law is incomplete without reference to the Roman-Dutch law. During the Republican era administrative powers were fairly extensive and, contrary to the trend in England, judicial control over the administration was diminishing. This was due to the fact that the sphere

¹ Supra

² Republic of South Africa Constitution Act 200 of 1993.

of politics (*politie*) was increasing at the expense of matters of justice (*justitie*). As a result the Dutch trend was away from rather than towards judicial review of administrative action³.

(ii) **English Law**

In England the maxim "the king can do no wrong" applied to delictual actions, with the result that the Crown was immune from legal process. As a result neither the king, his ministers nor his officials could be sued in tort (for delictual acts). However, although the Crown was not liable in tort, the injured party could sue the particular Crown servants.⁴

The position changed with the **Crown Proceedings Act of 1947**.⁵ In terms of this Act the Crown is subject to the same general liability in tort as that of a private person of full age and capacity. The Crown was therefore placed in the same position as that of an ordinary defendant.⁶

³ See Baxter L, *Administrative Law* (1984) 22-24.

⁴ See HWR Wade and CF Forsyth, *Administrative Law* (1994) 819-825.

⁵ Act 10 of 1947.

⁶ See section 2 of Act 10 of 1947.

C. South African Law

(i) Legislation

Before the introduction of the **State Liability Act of 1910**⁷ our courts applied the English principle of immunity- " the king can do no wrong." ⁸ It is of interest to note that in 1994, in the case of *S.v. Ggozo*⁹ the Ciskei General Division found that the English common law principle- " the king can do no wrong" - did not, and still does not, form part of the common law of the Republic of South Africa subsequent to the **Constitution of the Republic of South Africa Act 32 of 1961**, and hence did not form part of the law of (the then) Ciskei.

The Act of 1910 was followed by the State Liability Act of 1957.¹⁰

Section 1 of the **Act** reads as follows : "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract

⁷ Act 1 of 1910.

⁸ See *Binda v Colonial Government* (1887) 5 Sc 284.

⁹ 1994 (2) S.A. 756, CK GD.

¹⁰ Act 20 of 1957.

lawfully entered into on behalf of the state or out of any wrong committed by any servant of the state acting in his capacity and within the scope of his authority as such servant".

Although section 1 refers to contract and delict only, the courts have found that state liability is not confined to claims arising from contract and delict only. For example, the state may be liable in terms of the *actio de pauperie*.¹¹

(ii) The theoretical basis of state liability.

The courts have expressly stated that there is no difference between the position of the state and its servants and that of master and servant in private law.¹² In order to bring the master's vicarious liability within the general principle of fault in private law, some or other *culpa in eligendo* is presumed on the part of the master. However, **Wiechers** points out that working with the presumption of fault in the form of *culpa in eligendo* is inappropriate because it is virtually impossible to establish who was responsible for the negligent employment of the particular person. He suggests the adoption of the

¹¹ See *Union Government v Farr* 1913 CPD 818.

¹² See *BSA v Crickmore* 1921 AD 107.

risk principle as a basis for liability.¹³

The problem inherent in attempting to find a theoretical basis for state liability is well set out in *Feldman (pty) Limited v Mall* where the court points out that law is not always logical.¹⁴

In an attempt to find a theoretical basis for state liability for administrative action, reliance has also been placed on the risk principle.¹⁵ Generally, this principle postulates that the injured party should be compensated even if there was no fault on the part of the wrongdoer. The principle has however recent

been subjected to severe criticism.¹⁶

In some instances the state does compensate subjects who have suffered loss as a result of dangerous activity on the part of the state, without fault on the part of the servants of the state being proved, where legislative provision has been made for

¹³ M Wiechers, *Administrative Law* (1984) 307-309.

¹⁴ "But law is not always logical; on the very question underlying this liability, viz; the reason why a master should ever be liable for acts of the servant which are committed in disregard of his express instruction, judges and commentators have found difficulty in finding a logically satisfying basis, and the way in which the rule has been applied is probably a compromise between conflicting considerations." 1945 AD 733 at 799.

¹⁵ This is commonly known as liability without fault. Writers such as Baxter L, *Op cit*, use the term "strict liability."

¹⁶ See for example *Minister of Law and Order v Ngobo* 1992 (4) S.A. 882 (A).

compensation.¹⁷

D. The judicial approach to the limitation of state liability for police action.

(i) The "control test"

It is a well-known fact that the police generally exercise their functions in emergency situations, and for this reason it has always been found necessary to limit the liability of the state for police action. Thus, in determining the requirements for state liability, the courts have firstly relied on the model of the private service relationship, but have also required that the policeman in question acted in his capacity as a servant of the state and acted within the scope of his authority. In other words a decisive factor was whether the state could control the servant at the time when he performed the wrongful act. This approach by the courts, dubbed the "control test" has been applied in a number of cases.¹⁸

The early *locus classicus* on state liability is the case of *Union Government v Thorne*¹⁹ in which the

¹⁷ See for example section 65 of the Electricity Act 40 of 1958 and section 70 of the South African Transport Services Act 65 of 1981.

¹⁸ See *Union Government v Thorne* 1930 AD 47, *Sibiya v Swart* 1950 (4) S.A. 515 (A) and *Dames v De Kock* 1958 (1) S.A. 773 (E).

¹⁹ *Supra*.

court held that the state is liable for the acts of the police because all members of the police force are *prima facie* servants of the Crown.

In *Sibiya v Swart*²⁰ the plaintiff was arrested by a constable, who unlawfully assaulted him, causing him severe injury. The court found that where an assault takes place while a servant of the state is performing a statutory duty, which does not depend on the exercise of a discretion, that wrong falls within the meaning of the Act, and was committed by a servant of the state acting in his capacity and within the scope of his authority as such servant.

The outcome of this case is that the court adopted the view that an official who is permitted by statute or common law to exercise a discretion, does not act in his capacity as a servant of the state when exercising that discretion. In other words the exercise of the discretionary power removes him from the control of the state, which means that the state is accordingly not liable in delict.

In the case of *Naidoo en Andere v Minister van Polisie*.²¹ **Hiemstra AJP** discussed the question of the liability of the state for unlawful arrest executed by

²⁰ Supra.

²¹ 1976 (4) S.A. 954 (T).

its servants. **Hiemstra** rejected the approach laid down in the *Sibiya* case, holding that the position has been altered by section 5 of the **Police Act 7 of 1958**.²²

The judge found as follows :

"Dit is, met eerbied, intens moeilik om in hierdie bepaling te lees dat oral waar 'n polisiebeampte sy eie diskresie gebruik, die Staat nie aanspreeklik is nie, net omdat hy nie op die oomblik direk onder beheer van die Staat was nie. Hy is trouens in my oordeel altyd, wanneer hy met polisiewerk besig is, onder beheer van sy meerderes en gevolglik onder beheer van die Staat."²³

The judge rejected the contention that a policeman executes a "personal duty" when arresting a person as opposed to a statutory duty when he is investigating the alleged crime. **Hiemstra** therefore found that since the inclusion of article 5 of the **Police Act**, a policeman is always under the control of his superiors. He accordingly upheld the plaintiff's claim and awarded damages to all three plaintiffs.

²² The section reads as follows :
 "5. The functions of the South African Police shall be, inter alia,
 (a) the preservation of the internal security of the Union;
 (b) the maintenance of law and order;
 (c) the investigation of any offence or alleged offence and
 (d) the prevention of crime."

²³ At 957 of the report.

By contrast **Boshoff J** did not follow the *Naidoo* case in the Transvaal Provincial Division case of *Mhlongo v Minister of Police*²⁴ and refused to award damages to the plaintiff. He found that in effecting the arrest, the policeman was performing an act of personal nature, (in which he had exercised a personal discretion), and that the act was therefore not performed by him as a servant of the State, acting in his and within the scope of his authority as such servant.

The matter then came before the Appellate Division²⁵ where it was found that in performing their duties policemen are *prima facie* servants of the state, and that the exercise of a discretionary power does not necessarily take them out of that category of servants.

The court set out the state of the law regarding delictual wrongs committed by policemen, as follows :

- * all members of the police force are *prima facie* servants of the state.
- * a wrongful act committed by a member of the force in the course of his employment renders the state *prima*

²⁴ 1977 (2) S.A. 800 (T). A policeman, in attempting to arrest a certain Bhengu, negligently shot and killed a certain Mhlongo. The deceased's customary union partner claimed damages from the State.

²⁵ 1978 (2) S.A. 551 (A).

facie liable.

- * the state must then show that the policeman was exercising a duty which took him out of the category of servant *pro hac vice* and to do this, the state must show that the duty is of a personal nature in the sense that the state could not control him.
- * the essential criterion is whether the state or the employer can direct or control the servant in the exercise of his duty or function, which includes the exercise of a discretion.

In *Minister van Polisie en Andere v Gamble en Andere*²⁶ the court had the opportunity of deciding upon the question of the State's liability for an unlawful arrest. The Appellate Division found that a police officer is always under the command, supervision and control of his seniors and thus under the control of the state, when he is conducting police business.

(ii) The principle of fault

Wiechers²⁷ suggests that the limitation to the scope and ambit of state liability be sought in the requirement of fault. This would mean that a policeman who negligently **arrests** a person without a

²⁶ 1979 (4) S.A. 759 (A).

²⁷ Op cit, 336.

warrant will not render the State liable, since it is not expedient from the perspective of legal policy, (for example because of the nature of police functions) to hold the State liable for negligent arrests.

On the other hand negligent **detention**, where the element of necessity and urgency is lacking, should render the state liable.²⁸

McKerron²⁹ has however a different opinion altogether. According to him for an action of false imprisonment or illegal arrest to lie it is not necessary that the defendant should act maliciously; it is sufficient that the arrest should be illegal. It is however, **Wiechers'** approach which seems to have the support of earlier case law.³⁰

E. Minister of Police v Rabie 1986(1) S.A. 117 (A)

The risk principle appears to have been incorporated into our law via the decision in *Minister of Police v Rabie*.³¹ In this case an off-duty policeman, one Van

²⁸ Ibid.

²⁹ McKerron RG, *The Law of Delict* (1971) 160.

³⁰ In *Bhika v Minister of Justice* 1965 (4) S.A. 399 (W) the court implied that minimal fault displayed by a policeman in a case of wrongful arrest and detention influences the amount to be awarded as damages. See also the case of *Solomon v Visser* 1972 (2) S.A. 327 (C) and *Donono v Minister of Prisons* 1973 (4) S.A. 259 (C) for detention arising from callous disregard for the rights and freedoms of the plaintiff.

³¹ *Supra*.

der Westhuizen, who was employed as a mechanic in the police force, assaulted, arrested and detained the respondent, and caused a charge to be laid against him. Van der Westhuizen's duties centred on repairing police vehicles and he only worked during normal office hours. It was common cause that at the time of the assault he was dressed in private clothing, he was driving his private vehicle, and he was at the scene of the assault in pursuance of private interests.

Respondent alleged that Van der Westhuizen was at all times acting in his capacity as a policeman in the employ of the South African Police, and that he was acting within the course and scope of his employment.

(In the court *a quo* it was found that Van der Westhuizen had acted as a servant of the state and that the appellant was vicariously liable for the damages suffered by the respondent. The defendants were ordered to pay damages for assault, unlawful arrest, wrongful detention and malicious prosecution).

In the Appellate Division the majority found (**Van Heerden JA** dissenting) that :

" the cardinal question is whether the respondent has proved that Van der Westhuizen was acting in the course or scope of his employment as a servant of the state, ie whether he was doing the state's work, viz police work, when he committed the wrongs in question.

In this regard the state is in no better position than any other employer. (It would seem that instances of a policeman momentarily ceasing to be a servant *pro hac vice* because of eg, an exercise of discretion, if they do occur at all, are now exceptional).³²

Jansen JA identified two facets of the enquiry, namely :

- (a) What was the scope of Van der Westhuizen's employment, and
- (b) What was the relation of the act done by Van der Westhuizen to the functions he had to carry out.

In examining the functions of the police as set out in section 5 of the Police Act, he found that they include the making of an arrest; taking of the arrested person to the charge office and charging him with an alleged offence.

"Whereas Van der Westhuizen's work as a mechanic was limited as to time and place, his work as a policeman was not so circumscribed. In the absence of specific instruction to the contrary (and none have been brought to our attention) he could at any time and at any place embark on the discharge of his police functions. In certain circumstances, it might even have been his duty to do so but in others it would

³² Op cit 132.

have been a matter of discretion."³³

In so far as the second facet is concerned the judge³⁴ found that at the time and place in question Van der Westhuizen was dressed in private clothing. He was in his private vehicle in Malvern and on the scene in pursuance of private interests. According to the judge these circumstances did not *per se* exclude the possibility of his having then embarked upon police work. Van der Westhuizen could at any time, decide to proceed as a policeman if the circumstances so required.

Since he professed to act as a policeman and identified himself as a policeman when effecting the arrest the court found that it was a fair inference that Van der Westhuizen intended throughout to act as a policeman in the sense that he intended to exercise his authority as a policeman. This, according to the judge, was further evidenced by Van der Westhuizen's telling the Divisional Commissioner of Police that he had considered himself as being on duty at the time of the assault.

Although the questioning of a suspect, arresting him and taking him to the police station to be charged as

³³ Op cit 133.

³⁴ Op cit 133.

a suspect would normally fall within police functions, the judge, after analysing the facts and examining the evidence, found that Van der Westhuizen was totally self-serving and had acted *mala fide*. Van der Westhuizen knew from the beginning that the respondent was innocent and that there were no grounds for using his powers as a policeman.

Since Van der Westhuizen was actuated by malice (evident from the assaults and the false charge) it was clear that Van der Westhuizen had not in reality performed any of the functions set out in section 5 of the **Police Act**. Therefore, the question was whether the wrongs committed by him could at all be said to be done within the 'course and scope of his employment'.

Where the servant acts for his own interest, his intention must be considered-this is a subjective test. However where there is a "sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."³⁵

Here the court relied on the test laid down in *Feldman (Pty) Limited v Mall*³⁶ where it was held :

³⁵ Op cit 134.

³⁶ 1945 AD 733 at 741.

" a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy... because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work..."

By approaching the problem whether the policeman's acts were done "within the course and scope of his employment" from the angle of the creation of risk, the emphasis shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether these acts fall within the risk created by the state. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the state, according to the judge, created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy. He could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. The judge found that Van der Westhuizen's acts fell within this purview and in the light of the actual events it was evident that his appointment was conducive to the wrongs committed.³⁷ The appeal was

³⁷ Op cit 134.

dismissed.

In his dissenting judgment **Van Heerden JA** found that the policeman did not act in furtherance of his employer's business, holding :

" Although he professed to exercise police functions, he never intended to act on behalf of his employer or in furtherance of the latter's business. Hence the wrongs were capricious and independent acts for which the appellant cannot be held liable. In principle Van der Westhuizen's conduct cannot be distinguished from that of a policeman who professes to arrest a female victim for the alleged perpetration of an offence with the certain knowledge that she is innocent and with the sole purpose of taking her to a secluded spot in order to rape her."³⁸

F. The views of legal commentators on Rabie decision

In welcoming this decision, **M Stranex**³⁹ says that "it represents a further step in the development of the law relating to state liability for delicts committed by the police, clearly leaving behind an old aberration in our legal history." According to this writer the court has shown less dependence on the intention test and moved in the direction of 'risk'

³⁸ Op cit 132.

³⁹ 1986 SALJ 190.

test. It is the writer's final submission that "the state must accept this liability, for it created the initial risk and, like an insurance company, must accede to the claim of its insured (who presumably has also paid his premiums by means of income tax)." ⁴⁰

Also applauding this Appellate Division case, **J.C Van der Walt** ⁴¹ suggests that the risk principle should be wide enough to operate as a general basis for vicarious liability. According to him, delictual liability, based on the risk principle, should consist of the following three elements :

- (a) the considerable increase of the element of harm;
- (b) the increase of the probability of serious prejudice and
- (c) the unequal relationship between the actor and the prejudiced person.

In a bid to substantiate the third element, this writer explains the nature of the risk principle. According to him the application of the principle to the state is justified by the following factors : the considerably wide authority, the supporting state machinery, the drastic violation of the prejudiced person's interests and the relative defencelessness of the prejudiced person.

⁴⁰ Supra, at 195.

⁴¹ 1988 (51) THRHR 515 at 517.

G. Case law after the Rabie decision.

Rabie's case has been referred to in four recent decisions of the Appellate Division :

In *Tshabalala v Lekoa City Council*⁴² the court was concerned with the unlawful shooting of the plaintiff by a municipal policeman. The court found that the policeman was armed with his official firearm, and although the policeman was off duty at the time and in private clothes, there was a strong inference that he had purported, in threatening to arrest the appellant and firing a shot into the air, to perform his duties as a policeman and had intended to perform them.

The court, per **Grosskopf J.A.**, concluded that the wrongdoer had acted in the course and scope of his duties as a servant of the respondent. In this case it appears as if the court relied on the subjective test, referred to in the *Rabie* case.

In another case of *Minister van Wet en Orde v Wilson en 'n Ander*⁴³ the court, per **Van Heerden J.A.**, in referring to the "sufficiently close link" test laid down in the *Rabie* case, said the following :

⁴² 1992 (3) S.A. 21 (A).

⁴³ 1992 (3) S.A. 920 (A).

"Dit kom my dus voor dat selfs by 'n toepassing van die Rabie-maatstaf die verband tussen onregmatige benadeling deur 'n polisiebeampte vir sy eie doeleindes, maar met aanwending van sy bevoegdhede, en die risikoskepping so skraal kan wees dat die staat nie middelike aanspreeklikheid oploop nie."⁴⁴

In this case the court found that the minister could not be held liable, in view of the fact that the policeman's conduct was too far removed from the risk created by his appointment as a police officer.

In the case of *Macala v Town Council of Maokeng*⁴⁵ the court found that in attributing liability to the state for a delict committed by a policeman, the cardinal question is whether the policeman was acting in the course and scope of his employment. "In order to find that he had so acted, his acts must have some connection with police work, (whether subjectively or objectively viewed)... and it follows that the creation of the risk principle is directly related to the enquiry ... as such."

The case of *Rabie* was distinguished in the case of *Minister of Law and Order v. Ngobo*.⁴⁶ This was the

⁴⁴ Op cit 927.

⁴⁵ 1993 (1) S.A. 434 (A) at 441 of the report.

⁴⁶ 1992 (4) SA 822 (A).

case where plaintiff's deceased son was shot and killed, whilst involved in a street altercation with two off-duty police constables who were in plain clothes at the time. The ground on which *Rabie's* case was distinguished was that unlike Van der Westhuizen the two policemen at no stage, genuinely or ostensibly acted as such or exercised any official function.

In *Kumleben J.A's* view,⁴⁷ the reasoning behind the 'creation of risk' principle is open to criticism in the following respects :

- (i) the general principle is acknowledged to the extent that it is said that there must be a 'sufficiently close link' between the acts of the servant in his own interests and the business of his master. It is accepted in *Rabie's* judgment that Van der Westhuizen's purpose was totally self serving and *mala fide*.
- (ii) It is also implied in the creation of risk principle that the standard test as laid down in our case law has reference to 'deviation cases' and is to be restricted to them. Should the standard test be accepted as the appropriate one for cases in which at the relevant time the servant had deviated from the course of his

⁴⁷ Op cit 830 and 831.

regular employment, it follows that this test applies *ad eudem*, i.e more pertinently where the servant cannot be said to have deviated for the reason that he was not even remotely engaged in his master's affairs at any relevant stage prior to the commission of the delict and any claim on his part to have been thus employed at the time of the wrong is no more than a subterfuge.

- (iii) The extract from *Feldman's* case at 741 is cited in support of the 'creation of risk' principle to be a 'more apposite approach' to be applied in preference to the standard test. In this regard, **Kumleben J.A** agrees with the comment in the minority judgment namely, that the 'emphasis falls on the employee's improper conduct or negligence in carrying out his employer's work...'
- (iv) In the concluding paragraph the 'dominant question' is said to be whether the acts fall within the risk created by the state. As there was no genuine link between Van der Westhuizen's acts and his police work, and no real intention to carry out such duties, the 'creation of risk' would appear to be the sole basis on which vicarious liability could be said to arise from Van der Westhuizen's misconduct.

Kumleben J.A concluded by saying that in so far as *Rabie's* case may be said to have replaced the standard test (whether the policeman was engaged in police business) with one based on risk, the case was wrongly decided.

H. The Constitution of the Republic of South Africa Act 200 of 1993

Firstly, section 4 of the Act provides that the Constitution is the supreme law of the Republic and any law or Act inconsistent with its provisions, shall (unless otherwise provided for expressly or by necessary implication in the Constitution) be of no force and effect to the extent of the inconsistency.

Secondly section 11(2) provides that no person shall be subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman or degrading treatment or punishment.

The action by Van der Westhuizen in the *Rabie* case falls within the definition of degrading and inhuman treatment.⁴⁸

⁴⁸ In the case of *Denmark et al v Greece* (3321-3167; 3344 167 YB 12 bis) it was stated that the notion of inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which in the particular situation is unjustifiable. In *Wiechert v Federal Republic of Germany* (1404 162 (D 15 15) the European Commission of Human Rights found that securing a prisoner

Section 24 of the constitution provides that every person is entitled to administrative justice.

In terms of sub-section(d) every person has the right to administrative action, which is justifiable in relation to the reasons given for it, where any of his or her rights are affected or threatened. It cannot be said that Van der Westhuizen's actions were justifiable, with the result that his action was invalid at administrative law. Since the result of his action cannot be undone, it is apparent that some other form of redress is required, and here one should look to the state for compensation for the unlawful arrest, detention and prosecution.⁴⁹

The rights mentioned above, and indeed all the rights included in Chapter 3 may be limited by section 33(a), provided the limitation is reasonable, justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right. In my opinion none of the rights infringed in the Rabie case are affected by this section.

by fastening one hand and one foot in the same handcuffs while he was being transported from one place to another constituted inhuman treatment.

⁴⁹ See in this regard Minister of Law and Order v Hurley 1986 (3) SA 568 (A) in which the court examined the words "reason to believe", which appeared in section 29 (now repealed) of the Internal Security Act 74 of 1982. The effect of this decision is that there must be an objective basis for the decision.

I. Conclusion

It is clear from the *Rabie* decision that there is a move in the direction of the risk principle as the basis for vicarious liability. However, the four⁵⁰ cases which followed the *Rabie* decision have created a certain amount of confusion in legal circles. While the judiciary was still celebrating the birth of the new principle for vicarious liability-the risk principle-after the *Rabie* decision, those cases reverted to the application of the traditional standard test. The case in *Ngobo* was even bold enough to reject the risk principle on the basis that it is "controversial and untried."⁵¹ This in my view leaves a very unsatisfactory position in the law relating to vicarious liability.

Snyman⁵² in commenting on the *Rabie* decision indicates his distaste towards the application of the risk principle. In his view the principle is applied in the mistaken belief that the intention is the only form of *mens rea*. He, correctly in my opinion, suggests that *mens rea* in the form of negligence steers a middle course, and will ensure that the

⁵⁰ *Tshabalala v Lekoa City Council*, supra, *Minister Van Wet en Orde v Wilson en Ander*, Supra, *Macala v Town Council of Maokeng*, Supra and, *Minister of Law and Order v Ngobo*, Supra.

⁵¹ Op cit 833.

⁵² 1993 (56) THRHR 132. See also in general Snyman CR, Criminal Law, 2nd edition (1986) at 246.

court, while avoiding the unsatisfactory application of strict liability, will be able to serve the interests of public welfare by requiring the adoption of an objective standard of care.

In the *Rabie* case *mens rea*⁵³ in the form of intention was clearly present. Van der Westhuizen maliciously assaulted, arrested and detained the respondent. His action was clearly unreasonable and therefore unlawful and since the action could not be amended or altered on review, the alternative would be to claim compensation for damages suffered. However, a stumbling block in holding the state delictually liable appeared in the form of the question whether his acts fell within the meaning of the standard test, namely, acting within the scope of his employment.

It could be argued that by appointing a person such as Van der Westhuizen the state has increased the possibility of damages occurring, and that it should be delictually liable for damages under these circumstances.

⁵³ See J.C Van der Walt " Die staat se aanspreeklikheid vir onregmatige polisie optrede" 1988 THRHR 515 at 517 where he says that there are three normative elements for delictual liability based on risk.

These are :

- (a) an increase in the possibility of damage occurring;
- (b) the increase of the probability of serious prejudice and
- (c) a relationship of inequality between the perpetrator and the injured person.

On the facts of *Ngobo*⁵⁴ case the court held that in applying the standard test, the appellant could not be held liable for the constables's wrongful act of shooting at the deceased. Both constables were not on duty and they never purported to be carrying out any police function. According to the court the two police constables were at no stages engaged in the affairs of the Minister of Law and Order, their employer, and the only connection between their conduct and their employment was their use of the revolvers which they were authorised to retain after working hours.

In my view the following words of **Kumleben J.A.** in *Minister of Law and Order v Ngobo* ⁵⁵ clearly demonstrate the latest attitude of the Appellate Division towards the risk principle as the basis of vicarious liability. "To my mind the standard test adequately serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person, who might otherwise not be recompensed. Whilst one cannot gainsay the difficulty of applying the standard test in certain cases, the indeterminacy of the element of the proposed alternatives suggests

⁵⁴ Op cit 828.

⁵⁵ 1992 (4) S.A. 822 (A).

that their adoption would not make the task of determining liability any easier. In the circumstances there appears to me to be no sound reason for replacing a generally accepted principle with another, which is controversial and untried".⁵⁶

Since section 25 of the Constitution specifically sets out the rights of detained, arrested and accused persons, it is submitted that the members of the police force will have to be carefully chosen in order to minimise the number of claims against the state based on damages. The police, who must be viewed as the protectors of individual rights have to be carefully screened, trained and constantly supervised. In the event of a poorly trained or undisciplined person being recruited to the police force, there is no doubt that a greater possibility exists that damage may be occasioned to the general public.

Finally, it is clear that in so far as the test for vicarious liability is concerned the Appellate Division in *Ngobo's* case has, by reverting to the application of the traditional standard test, overruled its previous decision in the *Rabie* case. In my opinion, an uncertainty has been created in the law by these conflicting decisions and it is submitted that legislative intervention is warranted.

⁵⁶ Op cit at 833.

J. LIST OF ABBREVIATIONS

SALJ = South African Law Journal

THRHR = Tydskrif vir Hedendaagse Romeins Hollandse Reg

LAWSA = Law of South Africa

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7. South African Transport Services Act 65 of 1981
8. State Liability Act 1 of 1910
9. State Liability Act 20 of 1957

M. BIBLIOGRAPHY

1. Baxter L *Administrative Law* (1984) Juta & Co, Cape Town
2. LAWSA, Vol.8
3. McKerron R G *The Law of Delict* (1971) 7th Edition, Juta & Co, Cape Town
4. Snyman C R *Criminal Law* (1986) Second edition, Butterworths, Durban
5. Wade HWR and Forsyth CF *Administrative Law* (1994) 7th Edition, Clarendon Press, New York.
6. Wiechers M *Administrative Law* (1985) Butterworths, Durban

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